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No. [redacted] 17.

In the Supreme Court of the United States

OCTOBER TERM, 1934

T. A. MORRISSEY AND JAMES M. O'BRIEN, TRUSTEES OF AN EXPRESS TRUST, KNOWN AS WESTERN AVENUE GOLF CLUB, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 834

T. A. MORRISSEY AND JAMES M. O'BRIEN, TRUSTEES of an Express Trust, Known as Western Avenue Golf Club, petitioners

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 31–51) is not reported. The opinion of the Circuit Court of Appeals (R. 67–72) is reported in 74 F. (2d) 803.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 7, 1935 (R. 73). A petition

for rehearing was denied March 1, 1935. The petition for writ of certiorari was filed April 1, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTION PRESENTED

Whether the trust in question is an association.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 5–7.

STATEMENT

The facts as stipulated (R. 22–31) and as found by the Board (R. 33–45) may be summarized as follows:

On October 4, 1921, T. A. Morrissey and James M. O'Brien executed a declaration of trust to certain real estate in Los Angeles, California, a part of which was converted into a golf course operated for a time by the trust (hereinafter referred to as the petitioner), and the remainder subdivided into lots for sale. Prior to the taxable years 1924, 1925, and 1926, the club was transferred to a corporation for all of its capital stock. Thereafter, and until January 12, 1924, the petitioner operated it under a lease, when its operation by the petitioner ceased. There were 2,000 shares of common and a like amount of preferred stock. Man-

agement of the trust was vested in trustees, the shareholders having no rights, except to dividends. During the taxable years the activities of the trust were reduced to (1) the operation of the golf course as indicated above, (2) the conveyance of lots to purchasers, and (3) the collection of moneys due the trust and their distribution to the holders of beneficial interests therein by way of dividends, and, in some cases, by way of redemption and retirement of such interests.

The petitioner filed a trust return for each of the years of its existence. The Commissioner determined that it was an association, with resultant deficiencies in each of the taxable years. The Board sustained such determination, and the Circuit Court of Appeals affirmed the Board.

ARGUMENT

We recognize that, as stated by the petitioner in this case, there is much confusion in the Circuits in the interpretation and application of the rule laid down by this Court in *Hecht* v. *Malley*, 265 U. S. 144.

However, we think the court below correctly applied the rule in this case, and since in other cases presenting this issue this Court has refused to grant certiorari, we feel we should oppose the granting of the writ in this case. See *United States* v. *Neal*, 28 F. (2d) 1022 (C. C. A. 1st), certiorari denied, 278 U. S. 659; *Little Four Oil & Gas Co.* v. *Lewellyn*, 35 F. (2d) 149 (C. C. A.

3d), certiorari denied, 280 U. S. 613; *Allen v. Commissioner,* 49 F. (2d) 716 (C. C. A. 2d), certiorari denied, 284 U. S. 655; *Trust No. 5833, Security-First Nat. Bank v. Welch,* 54 F. (2d) 323 (C. C. A. 9th), certiorari denied, 286 U. S. 544; *Gray v. Hopkins,* 68 F. (2d) 561 (C. C. A. 5th), certiorari denied, 292 U. S. 643; *Tyson* v. *Commissioner,* 68 F. (2d) 584 (C. C. A. 7th), certiorari denied, 292 U. S. 657; and *Commissioner* v. *Pryor & Lockhart Development Co.,* 70 F. (2d) 154 (C. C. A. 10th), certiorari denied, 293 U. S. 574.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be denied.

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CARLTON FOX,
Special Assistants to the Attorney General.

MAY 1935.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 2. (a) When used in this Act—

* * * * *

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies. (U. S. C., Title 26, Sec. 1262.)

Section 2 (a) (2) of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U. S. C. App., Title 26, Sec. 1262), is identical with the provisions of Section 2 (a) (2) of the Revenue Act of 1924, *supra*.

Revenue Act of 1928, c. 852, 45 Stat. 791, 880:

SEC. 704. TAXABILITY OF TRUSTS AS CORPORATIONS—RETROACTIVE.

(a) If a taxpayer filed a return as a trust for any taxable year prior to the taxable year 1925 such taxpayer shall be taxable as a trust for such year and not as a corporation, if such taxpayer was considered to be taxable as a trust and not as a corporation either (1) under the regulations in force at the time the return was made or at the time of the termination of its existence, or (2) under any ruling of the Commissioner or any duly authorized officer of the Bureau of Internal Revenue applicable to any of such years, and interpretative of any provision of the Revenue Act of 1918, 1921, or 1924, which had not been reversed or revoked prior to the time the return was made, or under any such ruling made after the return was filed which had not been reversed or

revoked prior to the time of the termination of the taxpayer's existence.

(b) For the purpose of the Revenue Act of 1926 and prior Revenue Acts, a trust shall, at the option of the trustee exercised within one year after the enactment of this Act, be considered as a trust the income of which is taxable (whether distributed or not) to the beneficiaries, and not as an association, if such trust (1) had a single trustee, and (2) was created and operated for the sole purpose of liquidating real property as a single venture (with such powers of administration as are incidental thereto, including the acquisition, improvement, conservation, division, and sale of such property), distributing the proceeds therefrom in due course to or for the benefit of the beneficiaries, and discharging indebtedness secured by the trust property, and (3) has not made a return for the taxable year as an association.

Regulations 65, promulgated under the Revenue Act of 1924:

ART. 1502. *Association.*—Associations and joint-stock companies include associations, common-law trusts, and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the shareholders on the basis of the capital stock which each holds, or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. A corporation which has ceased to exist in contemplation of law but

continues its business in corporate form is an association or corporation within the meaning of section 2, but if it continues its business in the form of a trust, it becomes subject to the provisions of section 219.

ART. 1504.[1] *Association distinguished from trust.*—Where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business, and the beneficiaries have no control over the trust although their consent may be required for the filling of a vacancy among the trustees or for a modification of the terms of the trust, no association exists, and the trust and the beneficiaries thereof will be subject to tax as provided by section 219 and by articles 341–347. If, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists within the meaning of section 2. Even in the absence of any control by the beneficiaries, where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the statute.

Article 1502 and Article 1504 of Regulations 69, promulgated under the Revenue Act of 1926, are substantially identical with Articles 1502–1504 of Regulations 65, *supra*.

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[1] As amended by T. D. 3748, IV–2 Cumulative Bulletin 7.

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